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SUPREME COURT, U.S.

81-5386

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

HAL M. ROGERS, Appellant

vs

LARRY JINKS, P. ANTHONY RIDDER
SAN JOSE MERCURY NEWS, ONE DOE,
TWO DOE, THREE,DOE, ET AL.

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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Appellees

APPEAL FROM UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

JURISDICTIONAL STATEMENT

Hal M. Rogers
In Propria Persona
385 Delmas Avenue
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Pursuant to Rules 13(2) and 15 of the Supreme Court of the United States, HAL M. ROGERS, Appellant, files this statement of the basis on which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment and order in question and that the Court should exercise such jurisdiction in this case.

OPINIONS BELOW

The Federal District Court Order of Dismissal with prejudice claimed that the Court did not have jurisdiction of this action under Title 28, U.S.C., Section 1332, Diversity of Citizenship.

That the Court lacked jurisdiction of this case under Title 28, U.S.C., Section 1331, Federal Question.

That claims asserted were legally "wholly insubstantial and frivolous."

The Court stated that it did not have jurisdiction under Title 28, U.S.C. Section 2201. Creation of a Remedy.

The Federal District Court of Appeals stated that Rogers' contention is foreclosed by prior decisions and the refusal to entertain jurisdiction was proper.

The District Court properly rejected Rogers' claim of jurisdiction under Title 28, U.S.C. Section 2201. The Declaratory Act is not a jurisdictional statute.

This matter was dismissed with prejudice for lack of subject jurisdiction.

The Court of Appeals rejected Rogers' petition for rehearing.

GROUNDS FOR JURISDICTION OF SUPREME COURT

This appeal arises from a civil action filed for Declaratory Relief, Rule 57 FRCP, Title 28, U.S.C. Section 2201, in the Federal District Court for the Ninth District in San Jose, California on May 18, 1978. This appeal arises from the Order of the Court of Appeals for the Ninth Circuit that was entered on July 6, 1981.

A Stay of Mandate was granted on July 27, 1981 with an extension of time for filing an appeal to the United States Supreme Court to August 16, 1981. A Notice of Appeal to the Supreme Court was filed in the Court of Appeals on August 7, 1981.

The jurisdiction of the Court is invoked under Article III, Section 2.2 of the United States Constitution which states in part that,"...the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

The jurisdiction of the Court is invoked under Title 28, U.S.C. Section 1254(2) in that a direct appeal is sought and such appeal shall preclude review by writ of certiorari at the instance of the appellant, and review of appeal shall be restricted to the federal questions presented.

Cases that sustain this jurisdiction of the Court include; Bradford Electric Light Co. v. Clapper 284 US 221-224 El Paso v Simmons 379 U.S. 497, 501-503.

STATUTES INVOLVED

The statutes cited in the opinions of the lower courts are:
Title 28, U.S.C., Section 1331. Federal question, amount in controversy. (Appendix B-1)
Title 28, U.S.C., Section 1332. Diversity of Citizenship. (Appendix B-2)
Title 28, U.S.C., Section 2201 Creation of Remedy. (Appendix B-3)
Title 28, U.S.C., Section 2202 Further Relief. (Appendix B-4)

These statutes are set forth verbatim in APPENDIX B and consecutively numbered B-1, B-2, B-3, and B-4.

QUESTIONS PRESENTED

The courts below improperly issued dismissal with prejudice and orders without considering thoroughly the questions raised by

the plaintiff/appellant. The questions unresolved are:

Whether a newspaper, under the privileges and immunities granted it under the provisions of the First Amendment, can be required to print articles, "equal in time and space", both pro and con outside its editorial pages on any voting issue to be decided by the electorate.

Whether appellant was denied "due process" of the law during the progress of this suit through the district court and the court of appeals, together with the final orders of the judges, under the Fifth Amandment of the United States Constitution.

Whether the right of the appellant to a trial by jury under the Seventh Amendment of the United States Constitution was denied, despite the fact that this right was requested and never addressed by either court.

Whether the appellant was denied "equal protection of the law" and "due process" that run concurrently with the First Amendment rights as outlined in the provisions of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The facts of the case underlying this appeal follow. An actual controversy existed because the editor/publisher of this newspaper refused to print articles, outside the editorial pages, "equal in time and space" on a propositional issue that was to be voted upon by the electorate. This controversy lasted eighty-four days, dating from March 14, through June 6, 1978.

During the progress of this case through the courts of federal jurisdiction, an attempt was made to vacate these proceed-

ings after the original judge removed himself from the case.

Eight months elapsed before a "status conference" was held. That at the status conference, appropriate orders for a pre-trial conference and trial were never issued. Instead an Order of Dismissal with prejudice was decreed. Due process never occurred.

Under provisions of Rules 38 and 39 FRCP and Title 28, U.S.C. Section 2201 a request for a jury trial was sought. This request was never answered and it was ignored by both courts.

Declaratory Relief was sought under Rule 57 FRCP and Title 28 U.S.C. Section 2201. Damages sought were permissable under this same code section. Appellant answered the question of Diversity of Citizenship under Title 28, U.S.C., Section 1332.

Stage of Proceedings, District Court. 1. Complaint for Declaratory Relief, filed May 16, 1978 raised the following questions: (a) Controversy, request for publication of articles "equal in time and space", (b) Asked for judgment and damages in excess of $5,000 under Title 28, U.S.C., Section 2201.

2. Additional Points & Authorities, filed July 14, 1978. (a) Federal jurisdiction, United States Constitution, (b) Justifiable controversy, (c) Citations in support, (d) Judicial power-jurisdiction, four citations, (e) Diversity of Citizenship one citation, (f) Rule making power, courts-due process, three citations, (g) Standing-Substantial interest-Redress, three citations, (h) Public Forum-Newspapers, Excerpts of commentary of Justice Roberts (1939), The limitations of judicial power, "freedom of speech and press", subsequent punishment, clear and present dangers.

3. Points and Authorities in Support, Filed July 3, 1978.

(a) First Amendment, (b) Voting issue, (c) Additional exhibits in support, (d) Receipt: Payment for ad not run by San Jose Mercury, (e) Speedy hearing request.

Case heard August 11, 1978. Leave to Amend granted.

4. Leave to Amend: Points & Authorities filed September 8, 1978 (a) Jurisdiction, four citations, (b) Declaratory Judgment, nine citations, (c) Freedom of Speech, eleven citations, (d) Fourteenth Amendment, two citations, (e) Trial by Jury, Rule 38 FRCP, (f) Raised amount of damages to $10,000 as permitted by statute.

Stage of Proceedings, District Court of Appeals

1. Notice of Appeal, Filed March 1, 1979. All facts, statutes, constitutional averments that were presented to the District Court were filed with the Court of Appeals in this notice of appeal.

In addition, extensive portions of commentary by Supreme Court Justices, Hugo Black and William Douglas in their dissenting opinions, objections to federal rules of the court and the changes which allowed "pretrial dismissals", the courts' unlimited use of discretionary powers, out of court affidavits and other pretrial dispostions. In their opinions the courts rely on these methods instead of calling for a full-fledged trial to vindicate an honest and substantial case on its merits.

Appellants opening brief to the Court of Appeals again outlined all the facts, statutory provisions and constitutional questions that were pertinent and essential to the case.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial federal

questions hereinafter described. The questions raised and documented entail provisions of the First Amendment, Fifth Amendment, Seventh Amendment and the Fourteenth Amendment to the United States Constitution. The federal questions raised here are substantial and show the nature of the case. The Court rulings are such as to bring this case totally within the jurisdictional provisions relied upon and the cases cited to sustain. The questions raised are so substantial as to require plenary consideration, with briefs on the merits and oral arguments for their resolution.

FEDERAL QUESTIONS

Throughout the progress of this case, appellees' attorneys continuously reiterated paenisms of no federal question or jurisdiction. Appellant disagrees stating that cases arising because of constitutional questions are the realm of the federal courts.

> Cases arising under the Constitution of the United States, acts of Congress or treaties involving their interpretations and application and of which jurisdiction is given to federal courts are commonly described as involving "federal questions" McAllister v St Louis Merchants' Bridge Terminal Railway Co 324 Mo 1005 25 S W 2d 791, 792.

A genuine and substantial controversy encompassing a period of eighty-four days was ongoing at the time this suit was filed and a determination of decision by the courts was necessary to settle this issue. No such event occurred.

> A genuine and substantial controversy arising under the Constitution, a law or treaty of the United States, presented in such form, that the judicial power is capable of acting upon it and so directly involved in a case, that a determination thereof is necessary to a decision. Kansas v Colorado 206 U.S.46, 51 L Ed 956 27 S. Ct.

FIRST AMENDMENT

As this suit progressed through the lower courts, the appellees enjoyed their freedom of the press, but the appellant was denied his freedom of speech.

This First Amendment issue in the case of Rogers v San Jose Mercury-News essentially turns on this point. Can a privately-owned newspaper be required to print "pro" and "con" articles "equal in time and space", outside its editorial pages, concerning a propositional voting issue to be decided upon by the electorate.

Further, the question is whether the privileges and immunities granted publishers of newspapers are corollary to the equal responsibility to inform and educate their readers fairly and without bias on a voting issue that is the "peoples right to know" under the freedom of the press provision of the First Amendment to the Constitution.

As times and conditions relevant to the freedom of the press change so should conditions under which newspapers operate. Today the dissemination of the news bears little resemblance to how news was published 200 years ago or even 50 years ago. The communications revolution, with the advent of radio broadcasting in the 1920's to the introduction of television in the late 1940's has drastically altered the methods gathering and distributing the news.

Newspapers have become big business. Chains of newspapers, national newspapers, national wire services now dominate the news scene and the growing number of one-newspaper cities grows almost weekly witness the demise of the Washington Star the ceasing of publication of Tonight in New York City and the near collapse of

the Philadelphia Bulletin.

The growth of articles syndicated by the Washington Post, the New York Times, the Chicago Sun-Times and the Los Angeles Times that appear almost daily in other metropolitan newspapers, is worthy of note.

The elimination of competing newspapers in most of the large cities in this country, creating one-newspaper centers with large populations, and the concentration of control of radio and television ownership by large newspapers has resulted in some interesting statistics. In the past eighteen years ownership of television stations by newspapers has increased by sixty-five for a total of two hundred and twenty-six owned nationwide in 1981. This is 31% of all television stations operating in the United States. Newspapers own a total of five hundred and seventy-five AM and FM radio stations or 13% of the total radio stations on the air in this country.(Source:Statistical Abstract,Government Printing Office, 1981.)

II

Freedom to publish means freedom for all and not for some.

> Under the First Amendment the public has a right to every man's view and every man has the right to speak them. American Communications Assoc. CIO v. Douds 339 U.S. 382, 94 L.ed. 925.

In a decision of the Supreme Court, the Court held that significant issues of the times be made a public record.

> The First Amendment guaranty of freedom of speech and press is necessary to supply the public need for information and education with respect to the significant issues of the times. Wood v. Georgia 370 U.S. 8 L.ed 2d 569 S.Ct. 1364

Again the Court has stated that,

> The vitality of civil and political institutions in our society depend upon free discussion. Termnielo v. Chicago 237, U.S. 1, 93 L ed. 1131

The freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.

> Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. Associated Press v. United States 326 U.S. 1,2

In 1964 the Court in a decision titled New York Times v. Sullivan spoke of a profound national committment to the principle "that debate on public issues should be uninhibited, robust and wide-open."

Justice William Douglas nearly fifteen years ago expressing his concern of newspaper monopolies stated,

"Where one paper has a monopoly in an area it seldom presents two sides of an issue. It to often hammers away at one ideological or political line, using its monopoly position not to educate people, not to promote debate, but to inculcate in its readers one philosophy, one attitude - and to make money."

Note.(Excerpted The Great Debates)

Newspapers claim they are "surrogates for the public," but they fail to realize that with this position of trust carries with it a concomitant fiduciary obligation.

> The right of the press to state public things and discuss them, that right as every other right in human society, is subject to the restraints which seperate right from wrongdoing. Toledo Newspaper Co. v. United States 247 U.S. 402 , 62 L ed. 1186, 385 S.Ct. 560

Speaking of the freedom of the press, the Court has stated

> The underlying safeguard of the constitutional provisions for freedom of the press or speech is, "That opinion is free and conduct alone is amenable." Mutual Film Corporation v. Industrial Commission 236 U.S. 230, 59 L ed 55,21-355 C.387

These newspapers have stated, "We will not be measuring column inches and certainly will not be accepting someone else's measurements." (See Exhibit "B" original filing,plaintiff),App,B-7

> The rights of free speech and publication has limitations and is not an absolute right. Koingsberg v. State Bar of California 366 U.S. 36, 6 L ed. 2d 105

In another California case the Court stated that the press should not be restricted except to prevent abuse.

> Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right, is to guarantee that freedom of speech or press shall not be restricted except to prevent abuse. Werner v. So. California Assoc. of Newspapers. 35 Cal 2d 121,216,13 S. Ct. 290

The Court has ruled that on a voting issue a paper can be required to provide "equal space."

> The constitutional guarantee of freedom of the press is not encroached upon by affording appropriate remedies for the abuse of the privilege of free speech. Robinson v. Hotel Restaurant Employees. 35 Idaho 418, 207 P 132, 27 ALR 642

In the plaintiff's letter to defendant editor of March 13, 1978, marked Exhibit "A" , a request was made that "...articles and publicity equal in time and space ..." be printed in both of the newspapers he supervised. This request cannot be construed as "prior restraint" or censorship but simply a request for "fairness" and the "peoples right to know." (App.B-6)

In the case of Patterson v. Colorado 205 U.S. 454,463 (1907) Justice Holmes declared, "But the character of every act depends upon the circumstances in which it was done..." " The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.."

III

EQUAL TIME - THE FAIRNESS DOCTRINE

As newspapers continue to purchase and apply for radio and television licenses to broadcast the news, these same newspapers find themselves subject to the provisions and regulations of the Federal Communications Act (1934) and partiuclarly Title 47 U.S.C. Section 315.

As owners they are required under this section to provide "equal time" as defined under the "fairness doctrine." Hence newspapers in their dissemination of the news via radio and telecast, find that about two-thirds of their news is strictly governed by the Federal Communications Act. Yet newspapers jealously guard their rights under the freedom of the press provisions of the First Amendment, while submitting in their newscasts to the restraints of this Act.

In 1934 when Congress updated the Communications Act and passed this new law, it determination was that these restrictions were necessary because of the "scarcity" of radio channels available.

During the forty seven years since the enactment of the Federal Communications Act, radio station licensees have grown in number while the number of newspapers has declined. In 1981, radio stations now outnumber daily newspapers by a two to one margin. Today there are twenty-five hundred newspapers in existence while forty-three hundred radio stations operate.

Under provisions of the "fairness doctrine" is the requirement that public issues be presented on broadcast stations and that each side must be given fair coverage.

> The fairness doctrine requires broadcasting stations to make reasonable provision for the discussion of controversial issues of public importance and to operate on a basis of overall fairness. Kay v F.C.C., 1970, 443 F 2d 638, 143 U.S.App. D.C. 223.

On the fairness and balancing of public issue programs, the Court has stated

> The "public interest" standard of this chapter which invites reference to principles of U.S.C.A. Const. Amend. 1, does not require broadcasters to accept editorial advertisements. Columbia Broadcasting System, Inc. v. Democratic Nat. Committee, Dist.Col. 1973, 93 S.Ct. 2080, 412 U.S. 94, 36 L.Ed.2d 772.

As the result of a suit brought by the Public Media Center against the F.C.C. because of ads sponsored by the Pacific Gas & Electric Co. in support of nuclear power, the Commission reversed itself and issued new guidelines in September of 1979.

On the question of funding, the Commission ruled that in no instance can a station reject an otherwise suitable presentation on the grounds that it cannot obtain sponsorship.

In applying the "fairness doctrine" the licensee must make good faith judgments as to whether a controversial issue is of public importance and the general public is asked to vote on that issue. (Source: National Association of Broadcasters.L-933.

It is apparent that as newspapers continue to acquire "equal time" facilities and the number of newspapers being published continues to dwindle that the Supreme Court reassess its position on the issue here presented of "equal time" for a voting issue because of the "scarcity" of newspaper outlets.

IV

FIFTH AMENDMENT

DUE PROCESS-PROCEDURAL JURISDICTION

If due process means writs, orders or other writings by which a court exercises its jurisdiction of the legal proceedings in accordance with the law of the land, then appellant was denied his rights during the progress of the case.

Rule 57 FRCP is to be read in conjunction with the Federal Declaratory Judgment Act, Title 28 U.S.C. Section 2201; Creation of a Remedy and Section 2202, Further Relief. Where the stated remedy is not "speedy, efficient or adequate" federal courts may within their discretion grant declaratory relief.

The Federal Declaratory Judgment Act of 1934 provided that "in cases of actual controversy" federal courts could "declare rights and other legal relations of any interested party petitioning for such declaration whether or not further relief is or could be prayed."

> This law in providing remedies and definitive procedure in relation to cases and controversies in the constitutional sense, the Congress is acting within the delegated power over the jurisdiction of the Federal Court. S.Rept No. 1005 73rd Congress 2d Sess 1934.

A Constitutional First Amendment question was raised and supported by fifty exhibits supportive of the facts alleged. These exhibits covered a period of eighty-four days, the duration time of this controversy.

> It was established that the Declaratory Act is restricted to controversies which are such in the constitutional sense. Aetna Life Insurance Co. v. Haworth, U.S. 227 575 S.Ct 461.

Procedural statutes and rules applied in this case were equitable for the relief sought and the judgment asked.

> Since proceedings for declaratory relief have much in common with equitable proceedings, the equitable doctrine of laches has been applied in such proceedings Mock v Higgins, 3 ILL, App. 2d 281, 121 NE2d 865.

Due process must give an opportunity to be heard respecting the justice of the judgment sought.

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses. Goldberg v. Kelly 397 US 254, 269 (1970).

Any hearing in a court of law enunciates the principle of justice for everyone.

> Any legal proceeding enforced by public authority, whether sanctioned by age or custom newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law Hagar v. Reclamation District, ILL, U.S. 701, 708, (1884)

The assuming of jurisdiction in this case was proper

> A declaratory judgment is entirely appropriate and the court may not properly refuse to assume jurisdiction. Consequently the failure of the trial court to exercise its discretionary jurisdiction has been held grounds for reversal of the dismissal of the action. Moss v Moss 20 Cal 2d 640

The following citations clearly show that jurisdiction of the court was proper and refusal an abuse of discretion.

> Thus legal or equitable rights acquired under the laws of the United States may be prosecuted in either the Federal Courts or State Courts Tsang v Kan (CA 9 Cal) 173 F2d 204

This case properly stated that the Court had concurrent jurisdiction.

> Where jurisdiction is concurrent between federal and state courts, the plaintiff has the right to elect the tribunal he will sue in; and if the facts bring the case within its jurisdiction, a federal court must act Los Angeles Ry Corp. v. Railroad Commission (DC Cal) 29 F2d 140

As to a necessary and proper provision for the exercise of the jurisdiction conferred by Article III, Section 2, U.S. Constitution, the Congress may prescribe the effect to be given to judicial proceedings of the federal courts and may make all laws necessary for carrying into execution the judgments of the federal courts.

> It is most true that this Court will not take jurisdiction if it should not, but it equally true that it must take jurisdiction if it should. We cannot pass it up because it is doubtful. With whatever doubts, with whatever difficulties a case may be attended, we must decide it, if it brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp the constitution. Maybury v. Madison 1 Cr. (5 U.S.) 137 (1803)

V

SEVENTH AMENDMENT - TRIAL BY JURY

Under the provisions of the Seventh Amendment, U.S. Constitution, the right to a trial by jury is granted where the value in controversy exceeds twenty dollars as set forth verbatim.

> Seventh Amendment (Section 1) In suits of common where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the 1791 rule of common law.

The right to a trial by jury is to be scrupulously preserved for Rule 57 FRCP expressly provides that the "right may be demanded under the circumstances and in a manner provided in the

Rule 38 and Rule 39 FRCP. The right to a trial by jury is determined by the basic nature of the issues."

> The act (declaratory judgment) is a remedial statute and is to be liberally interpreted bearing in mind the legislative purpose. Dewey & Almy Chemical Co. v. American Anode CCA 333 3d (1943)

The dismissal of this case in a pretrial hearing effectively denied the appellant any trial as had been requested.

VI

FOURTEENTH AMENDMENT - EQUAL PROTECTION

The equal protection guaranty is intended to secure equality of protection, not only for all but against all similarly situated.

The laws to which the Fourteenth Amendment's guaranty of equal protection has reference do not relate to abstract units, but are expression of policy arising out of specific difficulties addressed to the attainment of specific ends by the use of specific remedies.

In this case the Court used Title 28 U.S.C.,Section 1331 (Appendix B-1) to deny that a federal question existed, although the questions raised concerning Constitutional Amendment No 1.were constitutional questions.

> The organic principle of equality includes wihtin its application, a granted privilege as well as a regulated right. Equality of benefit is required no less than equality of burden. Rosenblum v. Griffin 89 NH 314, 197 A 701, 115 ALR 367

The theory underlying constitutional requirements of equality is that all persons in like circumstances must be treatalike, both as to privilege conferred and as to liabilities or burdens imposed.

The implied power of the Federal government is evident in constitutional questions.

> Although based upon delegated and enumerated powers it is universally recognized that that which is implied in the Constitution is as much a part of it as that which is expressed. International Shoe Co. v. Pinkus 278 U.S. 261, 73 L ed. 318, s.Ct. 108

The question of Diversity of Citizenship was raised by the appelles, under Title 28, U.S.C., Section 1332 (Appendix B-2)

Pursuant to Rule 201 of the Federal Rules of Evidence states that any common citizenship of any plaintiff and defendant negates diversity of citizenship. Appellant here submits form letter exhibit (Appendix B-8) to prove that appellees contention of common citizenship is in error.

The above-numbered form letter from the office of the California Secretary of State indicates that as of May 23, 1978, the San Jose Mercury-News, newspapers owned by the Knight-Ridder Publications of Miami Florida,was not incorporated in the State of California.

The Suability doctrine of foreign corporations enunciates the "presence" status and the suability of such corporations.

> In the absence of consent, a foreign corporation is amenable to process to enforce a personal liability only if it is doing business within the state in such a manner and to such extent as to warrant the infer- that is present there. Philadelphia & Reading Ry. Co. v. McKibbon 243, U.S. 264, 265 (1917)

It is evident from the arguments presented and the case citations stated, that the appellant was denied the equal protection of the laws as well as due process under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

From the reasons stated above appellant submits that the appeal brings before the Court substantial and important constitutional as well as federal questions which require plenary consideration, with brief on the merits and oral argument for their resolution.

Dated Sept 5, 1981.

Respectfully submitted

HAL M. ROGERS
In Propia Persona